MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian Hartman

Re: Legislative & Regulatory Initiatives

Date: April 9, 2007

I am providing my analysis of twenty (20) legislative and regulatory initiatives in anticipation of the April 12 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DMMA Final Institutionalized Spouse Regulation [10 DE Reg. 1619 (April 1, 2007)]

This is an information item.

In April, 2006, DMMA adopted regulations which added illustrations to institutionalized spouse standards. The SCPD objected to characterizing any spouse receiving HCBS as an "institutionalized spouse" ineligible for spousal impoverishment protections. Based on an SCPD letter, CMS prompted DMMA to delete the illustrations. However, DMMA then issued new regulations whose text still eliminated spousal impoverishment protections for any spouse receiving HCBS. Based on a second SCPD letter, CMS influenced DMMA to agree to delete the objectionable text. DMMA published a revised set of regulations in February, 2007. The SCPD and GACEC endorsed the revised regulations. DMMA has now acknowledged the SCPD endorsement and adopted final regulations without amendment.

Since the regulations are now acceptable, this 12 month regulatory saga which began a year ago can be "laid to rest".

2. DMMA Final LTC Transfer of Assets Penalty Regulations [10 DE Reg. 1613 (April 1, 2007)]

The SCPD commented on the proposed version of these regulations in December, 2006. The Division was amending its transfer of assets "look back" standards to conform to changes in federal law based on the Deficit Reduction Act ("DRA"). The Council submitted two comments.

First, the Council noted that the DRA requires that applicants subject to a penalty be

advised that they can request an undue hardship waiver. The Council recommended that the notice include the procedure for requesting a waiver, general timetable for processing the request, and appeal rights. In response, DMMA indicates that it is developing an applicant notice and will consider the Council's recommendation.

Second, the Council noted that the DRA authorizes states to make "bed hold" payments to nursing homes while an "undue hardship" waiver application is being processed. DMMA declined to adopt the suggestion.

The Delaware Health Care Facilities Association and two attorneys also submitted comments. The DHCFA comments are disturbing. It solicited a Medicaid State Plan amendment to "supersede" Delaware statutory law and any DLTCRP standards which provide 30 days notice of discharge based on non-payment. The DHCFA wants nursing homes to be able to "promptly" discharge residents relying on Medicaid who are determined ineligible for LTC benefits due to the transfer of assets penalty. The Councils should be vigilant in monitoring any legislation which might attempt to dilute the current protections in Title 16 Del.C. §1121(18). I recommend that this solicitation (and background) be provided to Carol Ellis and Tom Murray to ensure that the DLTCPR is aware of the potential for such an initiative.

3. DMMA Final LTC Savings Bond Regulation [10 DE Reg. 1611 (April 1, 2007)]

The SCPD commented on the proposed version of these regulations in February, 2007. DMMA has now adopted final regulations with a few changes.

First, the Council noted that the regulations contained several obvious errors ("calrifying", "submitter", "avaailable", "valluation", and "ubless"). DMMA responded that it is working with the publisher to eliminate spelling errors.

Second, the Council noted that the regulatory text was inconsistent with the expressed intent of counting Savings Bonds as resources even during the initial retention period. DMMA agreed and eliminated the inconsistent sentence.

Third, the Council recommended that Delaware adopt the approach reflected in Vermont regulations in which the Savings Bond is not treated as a resource while a waiver request is pending. DMMA declined to follow the suggestion.

Fourth, the Council recommended that Delaware follow other states in "grandfathering" Savings Bonds purchased prior to the adoption of regulations. DMMA declined to accept the recommendation.

Fifth, the Council objected to the concept of counting Savings Bonds as resources during the initial retention period as inconsistent with Social Security POMS. DMMA responded that it believes its interpretation conforms to Region I CMS guidance.

Since the regulation is final, I recommend no further action.

4. DMMA Final LTC Annuity Regulation [10 DE Reg. 1601 (April 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in November, 2006. The Division has now issued final regulations with some changes prompted by the Council comments and three estate planning attorneys.

First, the Councils identified an anomaly based on different treatment of IRAs versus 401(k)s and 403(b)s but noted that this was the literal result of the federal Deficit Reduction Act ("DRA"). DMMA acknowledged the comment and agreed that this is the result of the DRA.

Second, the Councils identified some inaccurate language in Section 20330.4.1. DMMA agreed to insert a sentence proposed by the Councils.

Third, the Councils recommended some changes in format. DMMA declined to modify the format.

The estate planning attorneys submitted several objections to the proposed standards. DMMA effected a few amendments in response to the attorneys' comments.

Since the regulations are final, I recommend no further action.

5. DMMA Final LTC Promissory Note & Life Estate Regs. [10 DE Reg. 1596 (April 1, 2007)]

The SCPD commented on the proposed version of these regulations in February, 2007. Two estate planning attorneys also submitted comments. The DMMA has now adopted final regulations with three amendments recommended by the Council. DMMA adopted no changes based on the comments of the estate planning attorneys.

First, the Council recommended inclusion of "effective 4/1/06" in Section 20320.2.2.2. DMMA agreed and inserted the phrase.

Second, the Council recommended substituting "provided" for "providing" in Section 20320.2.2. DMMA agreed and effected the substitution.

Third, the Council recommended substituting "of" for "or" in Section 20330.3. DMMA agreed and effected the substitution.

Fourth, the Council identified both a structural and substantive concern with Section 20330.3. In pertinent part, the proposed regulation recited as follows:

> *DMMA will use the outstanding principal balance in determining resources unless the individual submits within 30 days the following information.*
>
> ~~*a. evidence of a legal bar to the sale of the agreement*~~

~~*b. an estimate from a knowledgeable source (financial institution, bank, real estate broker) showing the current market value of the agreement is less than its outstanding principal balance. The estimate must show the name, title and address of the source*~~.

Essentially, the regulation recites that DMMA will consider the "following information" and then deletes the subsections with the "information". This is structurally unsound. The deleted subsection allowed a note holder to demonstrate that its true worth is less than its outstanding principal balance. The Council objected to deletion of this subsection since a note could lose value based on a promissor's bankruptcy or destruction of mortgaged premises. One of the estate planning attorneys proffered the same objection. DMMA responded that "the comment is accurate" but the applicant would be provided the opportunity to rebut the note's value under a different regulation (Section 20320.2.2.6). I continue to believe that the amended regulation is inherently flawed. For perspective, I am attaching the new regulation and Section 203320.2.2.6.

A. First, it makes no sense to say that DMMA will adopt a certain value unless the applicant submits information while deleting the "information" section in its entirety.

B. Second, the regulation cited by DMMA as authorizing rebuttal of a note's value only applies to life estates, not notes!

Since the error in the regulation is obvious and patent, I recommend writing to Harry Hill to encourage reconsideration of this regulatory change.

6. DOE Final Standard Certificate Regulations [10 DE Reg. 1593 (April 1, 2007)]

This is an information item.

The SCPD and GACEC commented on the proposed version of these regulations in February, 2007. Although the DOE responded to the GACEC comments through a March 2 letter, it only mentions the SCPD comments in the regulatory text.

The Councils issued one recommendation, i.e., amending Section 6.3 to resolve an inconsistency. The DOE agreed and adopted a conforming amendment.

Since the regulations are final, I recommend no further action.

7. DOE Final Content Standards Regulations [10 DE Reg. 1583 (April 1, 2007)]

This is an information item.

The SCPD and GACEC commented on the proposed version of these regulations in February. The Councils shared only one concern, i.e., the regulations covered districts but omitted any reference to the requirement that charter schools align their curricula with State

content standards. The DOE responded that charter schools are required to align their curricula with State content standards under a separate regulation, 14 Admin. Code 275.4.3.1. This is accurate. The general charter school regulation includes such a requirement.

Since the regulations are final, I recommend no further action.

8. DOE Final Driver Education Regulations [10 DE Reg. 1587 (April 1, 2007)]

This is an information item.

The SCPD and GACEC commented on the proposed version of these regulations in February. The proposed changes were minor "housekeeping" amendments. Noting that the existing regulations contained several features recommended by the Councils in 2002, the Councils endorsed the proposed standards. The DOE acknowledged the endorsements and adopted the standards with no further amendments.

I recommend no further action.

9. DOE Proposed Diploma Regulations [10 DE Reg. 1508 (April 1, 2007)]

The DOE proposes to adopt amendments to its high school graduation standards. I have several observations.

First, the DOE requires submission of comments by April 5, 2007. At 1509. I suspect the DOE hoped for publication in the March registry. Obviously, the DOE must provide at least a 30-day comment period under the APA. See Title 29 Del.C. §10118.

Second, I recommend substitution of "student's guidance counselor" for "their guidance counselor" in 3 contexts: 1) Student Success Plan definition, first sentence; 2) Section 4.1; and 3) Section 4.2.3. It is grammatically incorrect to have a plural pronoun ("their") with a singular antecedent ("student").

Third, although the definition of "Support Services" is not earmarked for amendment, it merits revision.

A. I recommend substituting "educational" for "academic". A student may need help with a non-academic course, physical education. Moreover, some forms of assistance (e.g. behavioral counseling) are not academic in nature. The term "educational" is more encompassing. Cf. Mr. I and Mrs. I ex rel. L.I v. Maine Sch. Administrative District No. 55, 47 IDELR 121 (1st Cir. March 5, 2007)[IDEIA "education" is broader than "academics and includes physical, emotional, and social skills development]. Accord, OSEP Policy Letter to W. Lybarger, 17 IDELR 54 (September 14, 1990).

B. I recommend substituting "extra year(s) of high school" for "a fifth year of high school". The latter term could be considered limiting. Students with disabilities, in

particular, may need more than 1 extra year of high school to amass sufficient credits and pass the DSTP. Compare 14 DE Admin Code 925, Section 17: "Students with disabilities who are unable to meet the requirements for a diploma shall be given the option to complete those requirements by continuing their education, at district expense, until their 21st birthday."

Fourth, the relationship between an IEP and "Student Success Plan" (SSP) is not addressed. It is unclear if a special education student would have both an IEP and SSP. Since the personnel involved in drafting the plans are different, it is possible that the plans could be in conflict. The IEP's transition component would obviously overlap with the work force and post-secondary education components of the SSP. It would be preferable to incorporate SSP components into the IEP so there is a single, integrated plan. If DOE opts to have separate plans, I recommend that the "Student Success Plan" definition be amended to include participation of a DVR representative in the development of the SSP for students with disabilities.

I recommend that the Council share the above observations with the DOE and SBE. The Council may also wish to forward a copy of its comments to DVR.

10. DOE Proposed Health-Related Regulations [10 DE Reg. 1513 (April 1, 2007)]

The Department of Education proposes to adopt amendments to regulations covering the following: 1) school health record keeping; 2) physical examinations and screening; and 3) administration of medications and treatments. I have several observations.

804 Immunizations

Section 1.0 defines a "school enterer" as a child older than 2 months being admitted to a Delaware School District. Under the Delaware Code, some children are eligible at birth, not two months of age. See 14 DE Admin Code 925, Section 4.1.1 which recites as follows: "The age of eligibility for special education and related services for children identified as having a hearing impairment, visual impairment, deaf blindness, or autism, shall be from birth through 20 years, inclusive."

Section 2.1.1 is a convoluted, unintelligible single sentence comprised of 101 words. It is also grammatically infirm. It reads as follows:

> Four or more doses of diphtheria tetanus, pertussis (DtaP, DTP, or other approved vaccine) or a combination of these vaccines with the following exceptions: a child who received a fourth dose prior to the fourth birthday shall have a fifth dose; a child who received the first dose of Td (adult) at or after age seven may meet this requirement with only three doses of Td or Tdap (adult) one booster dose of Td or Tdap (adult) is recommended by the Division of Public Health for all students at age 11 or five years after the last DtaP, DTP or DT dose was administered whichever is later.

This "sentence" should be reformatted and divided into multiple sentences or subparts with

subheadings.

There are several instances in which citations are placed in apposition rather than within parentheses. See four references to "14 Del.C. §131(a)(9)" in Sections 2.1.5.2; 3.2; 3.5; and 4.0. It would be preferable to place the citations in parentheses. Compare proposed Regulation 811, Section 3.1; and proposed Regulation 815, Section 1.1.2 and Section 2.2.2.

811 School Health Record Keeping

In Section 1.0, consider the following amendment: "..when the student experiences an acute exacerbation of a health condition, becomes sick, or is injured at school." Otherwise, the "emergency treatment card" is "underinclusive" and would not "capture" allergic reactions or episodic flare ups of chronic conditions. In contrast, the end of this section refers to "any medical conditions or allergies".

In Section 5.1, delete the extraneous hyphen.

In Section 2.3.1.1, the first sentence is phrased as a DOE regulatory mandate that child care facilities and private nursery schools document lead screenings. While this is required by statute, the DOE has no authority to issue a regulation literally directing child care facilities to require screenings.

Section 2.3.1.1 omits the statutory exemption based on religious belief. See Title 16 Del.C. §2603.

Section 2.3.1.1 would literally preclude an 18 year old student transferring to a district from out-of-state from enrolling without lead screening documentation. Section 2.3 does not contain any age cut-off for requiring the lead screening. If the DOE intends to have no age cut-off, it would violate Title 16 Del.C. §2603 since the lead screening requirement only applies to children born after March 1, 1995.

Section 2.3.2 ostensibly contains an extraneous "the". This section reads as follows: "The school nurse shall the document the lead screening on the Delaware School Health Record Form (see 14 DE Admin. Code 511)."

817 Administration of Medications & Treatments

The Department intends to bar a school nurse from administering a valid prescription if its dosage is not within FDA recommended guidelines. Section 3.2 reads as follows: Medications and dosages administered by the school nurse shall be approved by the Federal Drug Administration (FDA) and comply with FDA recommendations." In the preface to the regulations (p. 1514), the DOE provides the following rationale:

> 3.2 States that the medications and dosages must be FDA approved. Schools have been struggling with doctors writing large doses of antipsychotic medications to children,

which are outside of the recommended doses. Also, parents bring in herbal medications. These later (sic "latter") medications have not been tested in children, do not have directions on proper dosing, nor does one know what side effects to look for.

Consistent with the attached materials, there are wide variations in how patients metabolize medications which may vary based on age, size, weight, health, and ethnicity. Moreover, FDA standards are not "the Gospel". Delaware's Medicaid program explicitly authorizes deviation from FDA dosage standards:

> a. Dosage limits: Medications are limited to a maximum dose recommended by the FDA, peer review journals that indicate that doses that exceed FDA guidelines are both safe and effective or doses that are specified in regional or national guidelines.

9 DE Reg. 420, 421 (September 1, 2005)

A school nurse should not disallow a child receiving a lower dose than recommended by the FDA or a higher dose recommended by the FDA. Literally, if a physician were titrating a child from a medication by slowly reducing dosage, and the dosage was less than the FDA recommended level, the nurse would be categorically precluded from administering the medication. This is a ridiculous result. If a nurse has a concern with a medication, she can contact the prescriber or pharmacy. However, as written, even if the nurse were informed by the pharmacy and prescriber that the dosage was safe and appropriate for the individual child, the nurse could not administer it if outside the FDA "recommended" (not mandatory) range.

I recommend the Council share the above observations with the DOE and SBE. I also recommend promptly sharing the comments with the AIDI psychiatric staff, DCMHS, and Delaware Medical Society to permit independent commentary by April 30.

11. DSS Proposed Child Care Subsidy Regulations [10 DE Reg. 1522 (April 1, 2007)]

The Division of Social Services proposes to amend its child care subsidy standards to clarify complaint procedures. I have only technical observations.

In the "Client Complaints" section, DSS includes the following sentence: "Forward the complaint to the Office of Child Care Licensing with a copy to the Child Care Monitor." In the "Provider Complaints" section, DSS includes the following sentence: "Send provider complaints regarding DSS provider contracts or payments process to the Child Care Administrator." In both instances, the implication is that the Case Manager would conduct the "forwarding" and "sending". However, as written, this is not explicit. It would be preferable to modify both sentences to recite that "(t)he Case Manager will forward...." and "(t)he Case Manager will send...".

Assuming the Council believes there is a sufficient disability nexus to justify commenting on the regulations, I recommend sharing the above recommendation with DSS.

12. Dept. Of Insurance Proposed MCO Appeal Regulations [10 DE Reg. 1523 (April 1, 2007)]

The SCPD and GACEC submitted similar comments on an earlier version of these proposed regulations in February, 2007. Comments were due by March 6. See 10 DE Reg. 1233 (February 1, 2007). I attach a copy of the March 5, 2007 GACEC letter which contains eleven (11) paragraphs.

Rather than adopting final regulations, the Department has reissued proposed regulations. The proposed regulations are almost identical to the February version with the following exceptions: 1) Section 16.0 contains different effective dates; 2) a new Section 7.4 has been added imposing a carrier and provider duty to arbitrate emergency care fee disputes; and 3) Section 7.3 has been modified in the context of emergency care services payment standards. None of the changes recommended in the Councils' earlier comments have been addressed.

I recommend that the Councils resubmit their earlier commentary with one amendment. The "Third" paragraph incorrectly refers to the "definition of Independent Health Care Appeals Program (IHCAP)". The "definition of the Independent Utilization Review Organization (IURO)" should be substituted.

13. S.B. No. 46 (Motorcycle Helmets)

This bill was introduced on March 14 and assigned to the Senate Public Safety Committee. The prime sponsor, Sen. Simpson, placed an amendment with the bill on March 21. The bill remained in Committee as of April 9, 2007.

As background, I attach a copy of the current statute [Title 21 Del.C. §4185(b)] which requires adults over 19 years of age to have a helmet in their possession while riding a motorcycle. Persons under 19 must actually wear the helmet. The bill would amend the statute to read as follows: "Every person operating or riding upon a motorcycle shall wear a safety helmet and eye protection that meets United States Department of Transportation Federal Motor Vehicle Safety Standard No. 218".

Consistent with the attachments, approximately 4 states have no helmet requirement. Approximately 20 states, including neighboring Maryland and New Jersey, have full helmet laws applicable to all riders. Approximately 26 states require riders below a certain age (18-20) to wear a helmet.

There are many reasons for requiring all riders to wear a helmet. The attachments reflect the following statistics.

Motorcycle deaths increase dramatically after repeal of helmet laws. Although motorcycles comprise less than 2% of all registered vehicles, they account for more than 9% of total traffic fatalities. After Pennsylvania repealed its mandatory helmet law in 2003,

motorcycle-related fatalities increased by 53%.

The fiscal impact on state budgets is dramatic. Almost 50% of motorcycle crash victims have no private health insurance. In 2004, Maryland estimated that repeal of its all-rider helmet law would increase Medicaid expenditures by $750,000 in the first year. The average treatment cost for a motorcycle accident-related head injury is conservatively estimated at $43,000.

Helmets reduce the risk of death by 29% and are 67% effective in preventing brain injuries to motorcycle riders. An unhelmeted motorcyclist is 40% more likely to suffer a fatal head injury and 15% more likely to suffer a nonfatal injury than a helmeted motorcyclist when involved in a crash.

Given the above considerations, I recommend a strong endorsement of the bill subject to one amendment, i.e., Title 21 Del.C. §2703(a)(3) should be amended to read "(a) safety helmet and eye protection that meets United States Department of Transportation Federal Motor Vehicle Safety Standard No. 218 must be worn". This would update the statute which requires riders with temporary instruction permits to wear a helmet to conform to the helmet standard reflected in S.B. No. 46. Given the fiscal impact of the bill, I recommend sharing the comments with DMMA and the Budget Office. Comments should also be shared with the BIA and SCPD BIC.

14. H.B. No. 92 (Health Insurance Arbitration)

This bill was introduced on March 22 and assigned to the House Economic Development/Banking & Insurance Committee. It remained in Committee as of April 9, 2007. The bill is almost identical to H.B. No. 438 which passed the House 41-0 on June 29, 2006 but received no action in the Senate. The attached May 23, 2006 press release on the predecessor bill indicates that it is supported by the Medical Society of Delaware, Delaware Physical Therapy Association, and Delaware Chiropractic Society. The attached Committee report on the predecessor bill recites that it is also supported by Blue Cross/Blue Shield of Delaware.

Substantively, the bill would require State-regulated insurers to submit to Department-sponsored arbitration if a provider requested it within 60 days after receipt of the insurer's decision. The Councils strongly endorsed the predecessor bill subject to one amendment. See attached June 26, 2006 GACEC letter. In a nutshell, an arbitrator may dismiss a provider application for arbitration without prejudice if the provider has not previously attempted to resolve the issue informally with the insurer [Section 333(l)]. The problem with this approach is that Section 333(b) only allows the provider to request arbitration within "sixty (60) days after the receipt of the decision rendered by the insurance carrier". If this "decision" is interpreted as the initial denial, as juxtaposed to a decision following informal negotiations, a provider whose application for arbitration is dismissed may be unable to timely refile after exhausting informal negotiations. I therefore recommend that the Councils endorse the bill subject to recommending the same amendment reflected in the June 26, 2006 GACEC letter.

15. H.B. No. 78 (Cell Phone Use in Vehicles)

This bill was introduced on March 14, 2007. It was reported out of committee on March 28. The primary sponsor placed an amendment with the bill on March 29. It awaited House action as of April 9, 2007.

Under current law, drivers with a Level 1 Learners Permit may not operate a vehicle while using a cell phone. See Title 21 Del.C. §2710(c)(8). Consistent with the attached September 21, 2005 article, the National Transportation Safety Board recommends that novice drivers be prohibited from using cell phones while driving.

This bill would ban hand-held cell phone use by all drivers regardless of age or experience. As amended, violation of the law would be a "primary" offense for which a driver could be stopped by police. Violation would result in a $50.00 civil penalty. This is also the model adopted for violations of Delaware's seat belt law and camera-based enforcement of traffic signals. See Title 21 Del.C. §§801, 4101(d), and 4802. No criminal fine or points would be assessed. According to the attached committee report, the bill is supported by the Delaware State Police, AAA Mid Atlantic, the Office of Highway Safety, and Verizon. I also attach a March 30 endorsement by the News Journal.

Consistent with the attachments, a driving-while-phoning ban has been adopted in New Jersey, New York, Connecticut, and Washington, D.C.. A ban will also take effect in California effective January 1, 2008. A similar bill banning hand-held cell phone use is pending in the Maryland legislature. See attached January 24, 2007 article. The principal rationale for such legislation is to deter distracted driving and thereby reduce traffic accidents and injuries.

I recommend endorsement of the bill subject to two amendments.

First, insert the word "device" at the end of proposed §4182B(a)(3). Compare Title 21 Del.C. §2710(c)(8).

Second, although not absolutely necessary, amend Title 21 Del.C. §801 to include a reference to the new §4182B.

16. H.B. No. 49 (Cigarette Tax)

This bill was introduced on January 25, 2007 and remained in the House Revenue & Finance Committee as of April 9. It would increase the tax on a pack of cigarettes sold in Delaware from 27.5 cents to 50 cents. In FY08, revenues in excess of $89 million attributable to the tax would be deposited in the Delaware Healthy Life Fund. In subsequent fiscal years, 38% of revenue attributable to the tax would be deposited in the Delaware Healthy Life Fund.

I have the following observations.

Consistent with the Governor's attached January 25, 2007 budget summary, the Governor linked the following initiatives to the Healthy Life Fund:

1) "$5 million to fund initiatives for the uninsured and underinsured (to come from a Healthy Life Fund that would result from a 45-cent-per-pack increase in the cigarette tax)";

2) "$1.1 million to expand the Delaware Healthy Children Program or CHIP (from

Healthy Life Fund)"; and

3) "$1 million to implement recommendations of the Health Disparities Task Force (from Healthy Life Fund").

The attached April 5, 2007 Governor's Legislative Agenda provides the following update: The Governor has also proposed a 45-cent-per-pack increase in the cigarette tax, which would create the Delaware Healthy Life Fund. That fund would be used to help provide health insurance for the uninsured, assist with the costs of Medicaid and expand the Delaware Healthy Children Program, among other initiatives.

Prospects for enactment of H.B. No. 49 are ostensibly slim. The attached April 6, 2007 article recites as follows:

Minner also called on lawmakers to approve her 45-cent a pack increase in the cigarette tax, which would pay for several health care initiatives. House leaders have said that plan is either dead or on life support.

Since the cigarette tax increase would generally enhance health care within the State, I recommend endorsement with one caveat. Section 2 of the legislation recites that some of the revenue derived from the cigarette tax "shall be deposited in the Delaware Healthy Life Fund as established by Chapter 61, Title 29 of the Delaware Code." However, Title 29 Del.C. Ch. 61 does not currently identify such a fund. Therefore, the sponsors may wish to determine whether the bill should be amended to affirmatively establish the Delaware Healthy Life Fund.

17. S.B. No. 66 (Child Care Subsidy)

This bill was introduced on March 29, 2007. It remained in the Senate Finance Committee as of April 9, 2007.

As background, the State offers day care/preschool subsidies to low income families to promote early childhood education and parent employment. In recent years, low reimbursement rates have prompted a reduction in the number of day cares which offer State "slots". S.B. No. 66 recites that "providers have great difficulty making ends meet when they are being reimbursed at 66-75% of the 2005 fair market rate". Historically, rates have been increased periodically based on fair market rate studies.

This bill would require DSS to conduct a study at least every 2 years and to establish a base reimbursement rate no less than 75% of the fair market rate established by the latest study. Consistent with the attached April 6 News Journal article, the Legislature's "Kids Caucus", which includes 24 legislators, has included this initiative among its legislative priorities. There is a fiscal note.

I recommend endorsement. The availability of subsidized day care/preschool promotes employability and enhances school-readiness among at-risk children.

18. S.B. No. 65 (Child Care "Tiered" Subsidy)

This bill was introduced on March 29, 2007. The primary sponsor placed an amendment with the bill on April 4. As of April 9, it remained in the Senate Children, Youth & Families Committee.

As background, the State offers day care/preschool subsidies to low income families to promote early childhood education and parent employment. Historically, rates have been increased periodically based on fair market rate studies. In recent years, low reimbursement rates have prompted a reduction in the number of day cares which offer State "slots".

This bill is ostensibly an alternative to S.B. No. 66. Like S.B. No. 66, it would require the Division of Social Services to conduct a fair market rate every 2 years. It would then authorize tiered reimbursement rates as an incentive for providers to exceed minimum standards. DSS would adopt a "quality rating and improvement system" through regulations. Enhanced subsidies would be based on multiple factors: 1) qualifications and professional development; 2) learning environment and curriculum; 3) family and community partnerships; and 4) management and administration. There is a fiscal note. The new subsidy system would be "phased in" over a six year period spanning FY 08 through FY 14. In Year 2, the bill contemplates "(m)andatory participation for all Preschool Special Education (619) programs and all child care centers with more than 90% purchase of care (POC) enrollment". The April 4 amendment defers the "phased in" implementation in the absence of an appropriation. Essentially, the timeline would begin upon initial appropriation.

I recommend endorsement with one caveat. Since S.B. No. 65 and S.B. No. 66 amend the same sections of Title 31 Del.C. §392, these are truly alternative bills. If one is passed, the other could not pass without amendments.

19. H.B. No. 94 (Adult Correction Healthcare Review Committee)

This bill was introduced on March 22, 2007. As of April 9, it remained in the House Corrections Committee. There is a fiscal note.

As background, the U.S. Department of Justice documented significant inadequacies within the Delaware DOC's health care system last year. Legislation was introduced in 2006 to require an assessment by the Chief Medical Examiner of all inmate deaths. However, the legislation (S.B. No. 306) was not enacted.

This bill is more comprehensive in scope. It would establish an independent committee comprised of nominees from several organizations. See proposed §8905A(a). It would have eight (8) functions listed in proposed §8905A(b). It would review medical records of inmate deaths, review the quality of healthcare within the DOC system, preside over second-level inmate healthcare grievances, and review health-related reports and statistics. The committee would submit an annual report to the Legislature and Governor.

I have the following observations.

First, proposed §8905A(b)(1) could be improved. It literally authorizes reviews of "inmates who have died while incarcerated". This would not cover inmates who are transferred "near death" to a hospital and then die in the ambulance or hospital. I recommend that the following be added after the words "while incarcerated": "or within ten days of transfer to a hospital or medical facility".

Second, there is some "tension" between characterizing the Committee as solely an advisor to the DOC Commissioner [§8905A(b)] and some duties, including "presiding" over grievances [§8509A(b)(3)] and submitting an annual report to the Governor and Legislature [§8905A(f)]. Consider amending §8905A(b) as follows: "The Committee serves in both a complementary and advisory capacity to the Commissioner of the Department of Correction..."

Subject to the above amendments, I recommend endorsement.

20. H.B. No. 83 (Gas Station Accessibility)

This bill was introduced on March 20, 2007. It was reported out of committee on March 28. It awaited further House action as of April 9, 2007. The bill repeals existing Title 6 Del.C. §2912 and substitutes a more ambitious version of this statute. The bill is almost identical to H.B. No. 113 with H.A. No. 1 which remained in Committee at the end of the last legislative session. The SCPD and DDC endorsed the predecessor bill and amendment. See attached May 2, 2005 letter.

The current statute reads as follows:

§ 2912. Self-service gasoline stations; attendants.

(a) Where a gasoline service station offers both full-service and self-service, the owner, operator or attendant handling the full-service equipment shall dispense gasoline from the self-service pump, during hours in which full-service is being offered at that station, upon the request of a disabled operator of a motor vehicle, provided that the vehicle operator properly displays a special plate or parking permit for a person with a disability as described pursuant to § 2134 or § 2135 of Title 21, and the person to whom the permit has been issued is the operator of the vehicle. The attendant shall have the right to request proof that the operator of the vehicle is the rightful owner of the vehicle to whom the special plate or parking permit for a person with a disability has been issued.

(b) Upon the request of a person with a disability or a person 85 or older to whom a special license plate or parking permit has been issued pursuant to § 2134 or § 2135 of Title 21, a retail establishment that offers gasoline for sale only on a self-serve basis must provide refueling assistance without a charge beyond the self-serve price. However, a retail establishment is not required to provide such service at any time that it is operating on a remote control basis with only 1 employee or if someone able to provide refueling

assistance is also in the vehicle. (66 Del. Laws, c. 282, § 1; 73 Del. Laws, c. 397, § 5.)

H.B. No. 78 would create the following standards.

First, a service station offering gas on both a self-service and full-service basis would be required to provide refueling assistance at the self-serve price to drivers displaying a "disability" plate or placard (lines 4-11).

Second, a service station offering only self-service gas would be required to provide at least 1 refueling site with an "accessible" button/device to signal that assistance is requested (lines 12-15). However, the station would not be required to provide such assistance: a) during hours in which it is being operated on a remote control basis by only one employee; or b) if a passenger in the vehicle could provide refueling assistance (lines 15-18). The signaling device requirement would be phased in over a 1-3 year period (lines 30-37). Violations would result in a civil penalty of between $300 and $600 (lines 27-29).

I recommend endorsement of the bill while recommending 2 amendments.

First, there is an anomaly in the bill insofar as the self-service subsection (line 13) applies to "a person with a disability or a person 85 or older" with a qualifying plate or placard while the full-service subsection (lines 5-6) only applies to "a person with a disability" with a qualifying plate or placard. The eligibility standard should preferably be consistent. This could be easily resolved by inserting "or a person 85 or older" after the word "disability" in line 6.

Second, I recommend deletion of the following sentence (lines 10-11): "An employee providing refueling assistance has the right to request proof that the operator of the vehicle is the owner of the vehicle to whom the special plate or parking permit has been issued." Delaware-issued placards are not vehicle-specific. See Title 21 Del.C. §2135. They are intended to be portable and may be used by persons who own no vehicle whatsoever. Moreover, it would be very difficult to "prove" that the placard has been issued to the operator since it contains no identifying information apart from a number and expiration date. While I prefer deletion of this sentence in its entirety, a compromise would be as follows: "A retail establishment has the right to request proof (e.g. registration card) that an operator qualifying for refueling assistance based on a special license plate is the owner of the vehicle."

Attachments

F:pub/bjh/legis/07p&l/407bils